IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

Crl.Rev.Pet.No. 3188 of 2007()

C.C. NO. 989 OF 2005 OF J.M.F.C., SASTHAMCOTTA
CRA.25 OF 2007 OF THE III ADDL. S.J. KOLLAM

REVN. PETITIONER: APPELLANT/ACCUSED

K.A.MUBASHIR, S/O ABOOBAKERKUNJU,
KALEELIL HOUSE, KIDANGAYAM NADUVIL,
SOORANADU SOUTH, PATHARAM P.O.

BY ADV. SRI.BRIJESH MOHAN

RESPONDENTS: COMPLAINANT & STATE

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1. ASHRUF, S/O IBRAHIMKUTTY,
KALLAYARAYYATHU KIZHAKKETHIL, KIDANGAYAM NADUVIL,
SOORANADU SOUTH.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.RAMKUMAR, J.

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Crl.R.P. No. 3188 of 2007

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Dated: 11-09-2007

O R D E R

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in C.C. No.989 of 2005 on the file of the J.F.C.M., Sasthamcotta, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the Revision Petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the Revision Petitioner re-iterated the contentions in support of the Revision. The courts below have concurrently held that the cheque in question was drawn by the petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the Revision Petitioner/accused failed to make the payment within 15 days of receipt of the statutory notice.

4. The learned counsel appearing for the revision petitioner contended that as per order dated 27-11-2006 in Crl.M.C. No. 3685 of 2006 this Court had permitted the revision petitioner/accused to cross-examine the complainant further on the next posting date subject to the condition that he pays an amount of Rs. 500/- as costs to the complainant. The counsel argues that even without giving the revision petitioner an opportunity to pay the cost the trial court was taking the case for orders and pronounced judgment on 22-12-2006 convicting the revision petitioner. When this grievance was voiced before the lower appellate court that court would hold that the petitioner did not avail of the benefit granted to him by this court by paying the cost. According the learned counsel the revision petitioner was not aware of the condition imposed by this court and that was the reason why the cost could not be paid on 12-12-2006 which was the next posting date.

5. I would have showed some indulgence to the revision petitioner if this version of the revision petitioner was true. But then, the specific case of the complainant that the revision petitioner borrowed a sum of Rs. 3,50,000/- on 14-12-2004 and he issued Ext.P1 cheque for the said amount was not taken exception to by the revision petitioner. His only contention was that the complainant who

is a farmer was incapable of raising that much amount. so as to lend it to the accused. First of all , in a prosecution under Sec. 138 of the N.I. Act the source of income of the complainant is irrelevant. Even assuming that it is relevant, the revision petitioner has no explanation as to how Ext.P1 cheque of which he is the account holder happened to be in the custody of the complainant. Under these circumstances, the courts below cannot be faulted for not giving the petitioner an opportunity to cross examine to prove the absence of means of the complainant to advance the amount in question. No other points arise for consideration.

6. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

7. What now survives for consideration is the question as to whether a proper sentence has been imposed on the Revision Petitioner. Having regard to the facts and circumstances of the case, I am, however, inclined to modify the sentence imposed on the revision petitioner. Accordingly, if the revision petitioner pays to the first

respondent complainant by way of compensation under Sec. 357 (3) Cr.P.C. a sum of **Rs. 3,50,000/- (Rupees three lakhs fifty thousand thousand only)** within **six months** from today, then he need to undergo only imprisonment till the rising of the court. If the revision petitioner commits default in making the payment as aforesaid, he shall undergo simple imprisonment for three months by way of default sentence.

This Revision is disposed of confirming the conviction but modifying the sentence as above.

V. RAMKUMAR, JUDGE.

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